



**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

MATTER OF W-S- LLC

DATE: OCT. 16, 2015

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, an advanced software development and consulting firm, seeks to employ the Beneficiary as a software designer engineer in test and to classify him as a nonimmigrant worker in a specialty occupation. *See* Immigration and Nationality Act (the Act) § 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The Director, California Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

The Director denied the petition, finding the evidence insufficient to establish that: (1) the proffered position qualifies as a specialty occupation; and (2) the Petitioner has sufficient work for the requested period of employment.<sup>1</sup> On appeal, the Petitioner states that the Director's grounds for denial were erroneous and contends that it satisfied all evidentiary requirements.

The record of proceeding before us contains: (1) the Form I-129 and the supporting documentation; (2) the Director's request for additional evidence (RFE); (3) the Petitioner's response to the RFE; (4) the Director's denial letter; and (5) the Form I-290B, Notice of Appeal or Motion, and the Petitioner's submissions on appeal. We reviewed the record in its entirety before issuing our decision.<sup>2</sup>

### I. THE PROFFERED POSITION

In the Labor Condition Application (LCA) submitted to support the visa petition, the Petitioner indicated that the proffered position corresponds to the occupational category "Computer Occupations, All Other" with SOC (ONET/OES) code 15-1199, at a Level I (entry level) wage.

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<sup>1</sup> Although the Director focused her decision on whether the position offered to the Beneficiary is a specialty occupation, she denied the petition on two stated grounds.

<sup>2</sup> We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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In the support letter submitted with the petition, the Petitioner wrote:

We intend to employ [the Beneficiary] in the professional position of *Software Designer Engineer in Test*. *Software Designer Engineer in Test* qualifies as a specialty occupation because it requires theoretical and practical application of a body of highly specialized knowledge and attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

As a *Software Designer Engineer in Test*, [the Beneficiary] will be responsible for the following duties:

- Program, debug and solve problems in C#, SQL and .Net Framework, XML, WCF and Azure.
- Develop and execute software test plans in order to identify software problems and their causes.

The Petitioner also submitted an offer letter, dated March 28, 2014, which stated that the Beneficiary would report to [REDACTED] Software Development Lead and perform the following duties:

- Responsible for migration of Sharepoint sites from on-premises to Cloud (Office 365).
- Writing PowerShell scripts for smooth migration runs that includes Export, Import, Upgrade and Redirection.
- Work involves migrating the tenants from Version to Version and upgrading from Build to Build.
- Automating daily administrative/migration tasks using PowerShell scripting.
- Coordinate with test and development teams responsible for day to day migration.
- Work with support team in executing request for changes (RFC's).
- Managing the execution of Rollback's, Change target sites, and marking sites to No-Access.
- Daily tasks include migrating sites, trouble-shooting, and fixing migrated site.
- Other daily tasks include: Configure machines required for migration process, deploy code upon new releases.

The Form I-129 indicated that the Beneficiary would not work at the Petitioner's address, but instead would be employed at [REDACTED] WA, [REDACTED]

In response to the RFE, the Petitioner clarified that the Beneficiary would be working at the offices of [REDACTED] on an assignment facilitated through [REDACTED]. The Petitioner stated that it requires "the minimum education of a Bachelor's degree or its working equivalent in a related field of study," but did not specify what might constitute a related field of study.

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The Petitioner also submitted a letter from [REDACTED] which stated that the Beneficiary is an employee of the Petitioner who has been working with [REDACTED] since April 1, 2013, handling the following responsibilities:

- Built, configured and maintained multiple test/production environments for hosting SharePoint Online machines.
- Involved in migrating transact, compute and storage machines from 2008R2 OS to 2012R2 OS.
- Responsible for deployment of SQL VMs.
- Writing PowerShell scripts for imaging process.
- Automating daily administrative/migration tasks using PowerShell scripting to ease the process of migrations.
- Handling the capacity of the SQL farm as per the requirement at the farm and zone levels.
- Worked with developers in resolving the imaging issues related to storage machines.
- Coordinating with the test and development teams responsible for day to day imaging issues.
- Responsible for migrating the Sharepoint sites from on-premises utility sites to cloud (Office 365).
- Has been involved in deploying Sharepoint farms.
- Has been involved in migrating the tenants from Version to Version and upgrading from Build to Build.
- Writing PowerShell scripts for smooth migration runs that includes Export, Import, Upgrade, and Redirection.
- Responsible for migrating the Sharepoint sites from Version to Version and upgrading from Build to Build.
- Managed the execution of Rollback's, Change target sites, marking sites to No-Access.
- Daily tasks include imaging machines with OS, deploying SQL VMs for additional capacity, trouble-shooting and fixing imaged machines, migrating sites, trouble-shooting and fixing migrated sites.
- Other daily tasks include: Configuring machines required for imaging process, troubleshooting imaged machines, handling status updates and reports, configuring machines required for migration process, and deployment of the code upon new releases.

Additionally, the Petitioner included a letter from [REDACTED] which stated that the Beneficiary "is performing contract services with [REDACTED] as Software Designer Engineer in Test through a Master Vendor Agreement between [REDACTED]. However, the Petitioner did not include a copy of the Master Vendor Agreement, nor any agreements that the Petitioner may have with [REDACTED]. The letter from [REDACTED] provided a project and position description and stated that the

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position requires “a minimum of a Bachelor’s Degree in Computer Applications, Information Technology, Networking or any related field, Math or any Engineering.” The letter further indicated that the position requires “extensive knowledge and experience of C#, PowerShell scripting, SQL Server development and administration, [REDACTED] Server Administration, Active Directory, IIS, TCP/IP protocols, Virtualization and Security tools.”

## II. EMPLOYER-EMPLOYEE RELATIONSHIP

As a preliminary matter and beyond the Director’s decision, we will first address whether the Petitioner has established that it meets the regulatory definition of a “United States employer” as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii). We reviewed the record of proceeding to determine whether the Petitioner has established that it will have “an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee.” *Id.*

### A. Legal Framework

Section 101(a)(15)(H)(i)(b) of the Act defines an H-1B nonimmigrant in pertinent part as a foreign worker:

subject to section 212(j)(2), who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 214(i)(1) . . ., who meets the requirements for the occupation specified in section 214(i)(2) . . ., and with respect to whom the Secretary of Labor determines and certifies to the [Secretary of Homeland Security] that the intending employer has filed with the Secretary [of Labor] an application under section 212(n)(1) . . . .

The term “United States employer” is defined in the Code of Federal Regulations at 8 C.F.R. § 214.2(h)(4)(ii) as follows (emphasis added):

*United States employer* means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) *Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and*
- (3) Has an Internal Revenue Service Tax identification number.

8 C.F.R. § 214.2(h)(4)(ii); *see also* 56 Fed. Reg. 61111, 61121 (Dec. 2, 1991). In the instant case, the record is not persuasive in establishing that the Petitioner will have an employer-employee relationship with the Beneficiary.

Although “United States employer” is defined in the regulations at 8 C.F.R. § 214.2(h)(4)(ii), it is noted that the terms “employee” and “employer-employee relationship” are not defined for purposes of the H-1B visa classification. Section 101(a)(15)(H)(i)(b) of the Act indicates that a beneficiary coming to the United States to perform services in a specialty occupation will have an “intending employer” who will file a Labor Condition Application (LCA) with the Secretary of Labor pursuant to section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1). The intending employer is described as offering full-time or part-time “employment” to the H-1B “employee.” Subsections 212(n)(1)(A)(i) and 212(n)(2)(C)(vii) of the Act, 8 U.S.C. § 1182(n)(1)(A)(i), (2)(C)(vii). Further, the regulations indicate that “United States employers” must file a Petition for a Nonimmigrant Worker (Form I-129) in order to classify beneficiaries as H-1B temporary “employees.” 8 C.F.R. § 214.2(h)(1), (2)(i)(A). Finally, the definition of “United States employer” indicates in its second prong that the petitioner must have an “employer-employee relationship” with the “employees under this part,” i.e., the H-1B beneficiary, and that this relationship be evidenced by the employer’s ability to “hire, pay, fire, supervise, or otherwise control the work of any such employee.” 8 C.F.R. § 214.2(h)(4)(ii) (defining the term “United States employer”).

Neither the former Immigration and Naturalization Service (INS) nor U.S. Citizenship and Immigration Services (USCIS) defined the terms “employee” or “employer-employee relationship” by regulation for purposes of the H-1B visa classification, even though the regulation describes H-1B beneficiaries as being “employees” who must have an “employer-employee relationship” with a “United States employer.” *Id.* Therefore, for purposes of the H-1B visa classification, these terms are undefined.

The United States Supreme Court has determined that where federal law fails to clearly define the term “employee,” courts should conclude that the term was “intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.” *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) (hereinafter “*Darden*”) (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). The Supreme Court stated:

In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party’s right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

*Darden*, 503 U.S. at 323-324 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. at 751-752); see also *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440, 445 (2003) (*Clackamas*). As the common-law test contains “no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.” *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).

In this matter, the Act does not exhibit a legislative intent to extend the definition of “employer” in section 101(a)(15)(H)(i)(b) of the Act, “employment” in section 212(n)(1)(A)(i) of the Act, or “employee” in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. See generally 136 Cong. Rec. S17106 (daily ed. Oct. 26, 1990); 136 Cong. Rec. H12358 (daily ed. Oct. 27, 1990). On the contrary, in the context of the H-1B visa classification, the regulations define the term “United States employer” to be even more restrictive than the common law agency definition.<sup>3</sup>

Specifically, the regulatory definition of “United States employer” requires H-1B employers to have a tax identification number, to engage a person to work within the United States, and to have an “employer-employee relationship” with the H-1B “employee.” 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term “United States employer” not only requires H-1B employers and employees to have an “employer-employee relationship” as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms “employee” or “employer-employee relationship” combined with the agency’s otherwise generally circular definition of United States employer in 8 C.F.R. § 214.2(h)(4)(ii) indicates that the regulations do not intend to extend the definition beyond “the traditional common law definition” or, more importantly, that construing these terms in this manner would thwart congressional design or lead to absurd results. Cf. *Darden*, 503 U.S. at 318-319.<sup>4</sup>

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<sup>3</sup> While the *Darden* court considered only the definition of “employee” under the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. § 1002(6), and did not address the definition of “employer,” courts have generally refused to extend the common law agency definition to ERISA’s use of employer because “the definition of ‘employer’ in ERISA, unlike the definition of ‘employee,’ clearly indicates legislative intent to extend the definition beyond the traditional common law definition.” See, e.g., *Bowers v. Andrew Weir Shipping, Ltd.*, 810 F. Supp. 522 (S.D.N.Y. 1992), *aff’d*, 27 F.3d 800 (2nd Cir.), *cert. denied*, 513 U.S. 1000 (1994).

However, in this matter, the Act does not exhibit a legislative intent to extend the definition of “employer” in section 101(a)(15)(H)(i)(b) of the Act, “employment” in section 212(n)(1)(A)(i) of the Act, or “employee” in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. Instead, in the context of the H-1B visa classification, the term “United States employer” was defined in the regulations to be even more restrictive than the common law agency definition. A federal agency’s interpretation of a statute whose administration is entrusted to it is to be accepted unless Congress has spoken directly on the issue. See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-845 (1984).

<sup>4</sup> To the extent the regulations are ambiguous with regard to the terms “employee” or “employer-employee relationship,” the agency’s interpretation of these terms should be found to be controlling unless “plainly erroneous or inconsistent

Accordingly, in the absence of an express congressional intent to impose broader definitions, both the “conventional master-servant relationship as understood by common-law agency doctrine” and the *Darden* construction test apply to the terms “employee” and “employer-employee relationship” as used in section 101(a)(15)(H)(i)(b) of the Act, section 212(n) of the Act, and 8 C.F.R. § 214.2(h).<sup>5</sup> Therefore, in considering whether or not one will be an “employee” in an “employer-employee relationship” with a “United States employer” for purposes of H-1B nonimmigrant petitions, USCIS must focus on the common-law touchstone of “control.” *Clackamas*, 538 U.S. at 450; *see also* 8 C.F.R. § 214.2(h)(4)(ii) (defining a “United States employer” as one who “has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise *control* the work of any such employee . . . .” (emphasis added)).

The factors indicating that a worker is or will be an “employee” of an “employer” are clearly delineated in both the *Darden* and *Clackamas* decisions. *Darden*, 503 U.S. at 323-324; *Clackamas*, 538 U.S. at 445; *see also* *Restatement (Second) of Agency* § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker’s relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer’s regular business. *See Clackamas*, 538 U.S. at 445; *see also* *New Compliance Manual*, Equal Employment Opportunity Commission, § 2-III(A)(1) (adopting a materially identical test and indicating that said test was based on the *Darden* decision); *see also* *Defensor v. Meissner*, 201 F.3d 384, 388 (5th Cir. 2000) (determining that hospitals, as the recipients of beneficiaries’ services, are the “true employers” of H-1B nurses under 8 C.F.R. § 214.2(h), even though a medical contract service agency is the actual petitioner, because the hospitals ultimately hire, pay, fire, supervise, or otherwise control the work of the beneficiaries).

It is important to note, however, that the factors listed in *Darden* and *Clackamas* are not exhaustive and must be evaluated on a case-by-case basis. Other aspects of the relationship between the parties relevant to control may affect the determination of whether an employer-employee relationship exists. Furthermore, not all or even a majority of the listed criteria need be met; however, the fact finder must weigh and compare a combination of the factors in analyzing the facts of each individual case. The determination must be based on all of the circumstances in the relationship between the parties, regardless of whether the parties refer to it as an employee or as an independent contractor relationship. *See Clackamas*, 538 U.S. at 448-449; *New Compliance Manual* at § 2-III(A)(1).

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with the regulation.” *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359, 109 S.Ct. 1835, 1850, 104 L.Ed.2d 351 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945)).

<sup>5</sup> That said, there are instances in the Act where Congress may have intended a broader application of the term “employer” than what is encompassed in the conventional master-servant relationship. *See, e.g.*, section 214(c)(2)(F) of the Act, 8 U.S.C. § 1184(c)(2)(F) (referring to “unaffiliated employers” supervising and controlling L-1B intracompany transferees having specialized knowledge); section 274A of the Act, 8 U.S.C. § 1324a (referring to the employment of unauthorized workers).

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Furthermore, when examining the factors relevant to determining control, USCIS must assess and weigh each actual factor itself as it exists or will exist and not the claimed employer's right to influence or change that factor, unless specifically provided for by the common-law test. *See Darden*, 503 U.S. at 323-324. For example, while the assignment of additional projects is dependent on who has the *right to* assign them, it is the *actual* source of the instrumentalities and tools that must be examined, not who has the *right to* provide the tools required to complete an assigned project. *See id.* at 323.

Lastly, the "mere existence of a document styled 'employment agreement'" shall not lead inexorably to the conclusion that the worker is an employee. *Clackamas*, 538 U.S. at 450. "Rather, . . . the answer to whether [an individual] is an employee depends on 'all of the incidents of the relationship . . . with no one factor being decisive.'" *Id.* at 451 (quoting *Darden*, 503 U.S. at 324).

## B. Analysis

The Petitioner claims that it will have an employer-employee relationship with the Beneficiary. We have considered this assertion within the context of the record of proceeding. We examined each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010). However, as will be discussed, there is insufficient evidence in the record to support this assertion. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Applying the *Darden* and *Clackamas* tests to this matter, we find that the Petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the Beneficiary as an H-1B temporary "employee."

Specifically, a key element in this matter is who would have the ability to hire, fire, supervise, or otherwise control the work of the Beneficiary for the duration of the H-1B petition. However, we find that the Petitioner has provided inconsistent information regarding this element. For example, the record contains an offer letter dated March 28, 2014, which states that [REDACTED], Software Development Lead, would supervise the Beneficiary. The Petitioner also submitted an itinerary dated December 21, 2014, stating that the Petitioner's Director, [REDACTED], would oversee the Beneficiary, but this evidence contradicts the offer letter and no explanation of the discrepancy was provided. We further note that the record does not contain evidence that [REDACTED] is employed by the Petitioner. In the Form I-129, the Petitioner indicated that it currently has two employees, and based on the documents in the record of proceeding, it appears that the two employees are [REDACTED] the Director, and [REDACTED] the HR Director.

Further, the Petitioner submitted copies of email correspondence between the Beneficiary and the personnel from [REDACTED]. In the emails, the Beneficiary's name is followed by [REDACTED] suggesting that the Beneficiary is identified as an employee of [REDACTED] through his email address. Further, the emails indicate that the Beneficiary reports his progress to several individuals including

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██████████ but there is no evidence that ██████████ is employed by the Petitioner. In addition, a copy of the Beneficiary's badge at ██████████ was submitted, but it lists him as being affiliated with ██████████ not the Petitioner. The Petitioner also submitted a letter from ██████████ to confirm the Beneficiary's employment. Notably, the letter is signed by ██████████, a senior service engineering lead. The Petitioner also submitted a letter from ██████████ signed by ██████████ whose position is not identified. In other words, there is a lack of information as to how the day-to-day work of the Beneficiary has been and will be supervised and overseen by the Petitioner at ██████████

We note that the Petitioner submitted documents that contain information such as reported hours, accomplishments, work in progress, pending/planned work; however, it appears that such information is provided by the Beneficiary and there is no information on how the Petitioner verifies the information provided by the Beneficiary. Therefore, we find that the Petitioner has not provided sufficient evidence with regard to how the Petitioner controls the manner and means by which the product (or in this case, the service) is accomplished and the assignment of additional projects.

As previously noted, when making a determination of whether the Petitioner has established that it will have an employer-employee relationship with the Beneficiary, we look at a number of factors, including who will provide the instrumentalities and tools required to perform the duties; whether the Petitioner has the right to assign additional work to the Beneficiary; the method of payment of the Beneficiary's salary; whether the specialty occupation work is part of the Petitioner's regular business; and whether the Petitioner actually supervises the Beneficiary's work. In the instant case, the Director specifically noted these factors in the RFE and requested that the Petitioner provide a number of documents, including copies of contracts it may have with end clients. Thus, while the Petitioner was given an opportunity to clarify the source of instrumentalities and tools and who actually supervises the Beneficiary's work, it did not provide sufficient information. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Without full disclosure of all of the relevant factors, we are unable to find that the requisite employer-employee relationship will exist between the Petitioner and the Beneficiary.

Further, upon review of the record, we find that the Petitioner has not established the duration of the relationship between the parties. As previously discussed, the Petitioner claims that the Beneficiary would work at ██████████ offices for the duration of the petition pursuant to a contract between ██████████ and ██████████, however, the Petitioner did not submit copies of the contracts. The Petitioner also did not submit any contracts it may have with ██████████. The Petitioner submitted a letter from ██████████ which states that "[the Beneficiary] has been on ██████████ since April 1st, 2013, and we expect his assignment to continue longer time until H1B is valid." However, no supporting documentation was provided evidencing this and the letter ██████████ does not mention a time period in its letter.

Although the Petitioner requested that the Beneficiary be granted H-1B classification from October 1, 2014, to September 17, 2017, there is a lack of substantive documentation regarding any work for the duration of the requested period. Rather providing evidentiary documentation to establish

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definitive, non-speculative employment for the Beneficiary for the entire period requested, the Petitioner simply asserts that the Beneficiary would be work at [REDACTED] during the requested validity dates.

Therefore, we find that the petitioner has not established that the petition was filed for non-speculative work for the beneficiary, for the entire period requested, that existed as of the time of the petition's filing. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(1). Merely claiming that the Beneficiary would be assigned to Microsoft for the duration of requested employment period, without sufficient corroborating evidence supporting the claim, such as copies of the client contracts, does not establish eligibility in this matter. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l. Comm'r 1978). Thus, even if it were found that the Petitioner would be the Beneficiary's United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii), the Petitioner has not demonstrated that it would maintain such an employer-employee relationship for the duration of the period requested.<sup>6</sup>

It cannot be concluded, therefore, that the Petitioner has satisfied its burden and established that it qualifies as a United States employer with standing to file the instant petition in this matter. *See* section 214(c)(1) of the Act (requiring an "Importing Employer"); 8 C.F.R. § 214.2(h)(2)(i)(A) (stating that the "United States employer . . . must file" the petition); 56 Fed. Reg. 61111, 61112 (Dec. 2, 1991) (explaining that only "United States employers can file an H-1B petition" and adding the definition of that term at 8 C.F.R. § 214.2(h)(4)(ii) as clarification). Accordingly, the petition must be denied on this additional basis.

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<sup>6</sup> The agency made clear long ago that speculative employment is not permitted in the H-1B program. For example, a 1998 proposed rule documented this position as follows:

Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. *See* section 214(i) of the Immigration and Nationality Act (the "Act"). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998).

### III. SPECIALTY OCCUPATION

We will now address the Director's finding that the Petitioner did not establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions.

#### A. Legal Framework

To meet its burden of proof in establishing the proffered position as a specialty occupation, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires [(1)] theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires [(2)] the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or

- (4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), USCIS consistently interprets the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing “a degree requirement in a specific specialty” as “one that relates directly to the duties and responsibilities of a particular position”). Applying this standard, USCIS regularly approves H-1B petitions for qualified beneficiaries who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not rely simply upon a proffered position’s title. The specific duties of the position, combined with the nature of the petitioning entity’s business operations, are factors to be considered. USCIS must examine the ultimate employment of the Beneficiary, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d at 384. The critical element is not the title of the position nor an employer’s self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

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## B. Analysis

In this matter, the record contains material inconsistencies concerning the description of the proffered position. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

As noted, the Petitioner stated that it requires a bachelor's or higher degree in a related field of study but did not specify what specific specialty is required for the position. The letter from [REDACTED] indicated that the position requires "a minimum of a Bachelor's Degree in Computer Applications, Information Technology, Networking or any related field, Math or any Engineering." [REDACTED] also indicated that it requires "extensive knowledge and experience" in "C#, PowerShell scripting, SQL server development and administration." The letter from [REDACTED] did not state educational requirements for the position.

We note that [REDACTED] requirements do not establish that a bachelor's degree in a specific specialty is required for the position. In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty (or its equivalent)" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in two disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty (or its equivalent)," unless the Petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required "body of highly specialized knowledge" is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added).

In other words, while the statutory "the" and the regulatory "a" both denote a singular "specialty," we do not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty. *See* section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). This also includes even seemingly disparate specialties providing, again, the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position. The issue here is that it is not readily apparent that all of these fields of study are closely related or that all of the fields are directly related to the duties and responsibilities of the particular position proffered in this matter.

Further, the letter from [REDACTED] indicates that a bachelor's degree plus extensive knowledge and experience is required for the position; however, the LCA was filed for a level I (entry-level) wage.<sup>7</sup>

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<sup>7</sup> The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is

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The Level I wage rate indicates that the Beneficiary is only required to have a basic understanding of the occupation and carries expectations that the Beneficiary will perform routine tasks that require limited, if any, exercise of judgement; that he would be closely supervised; that his work would be closely monitored and reviewed for accuracy; and that he would receive specific instructions on required tasks and expected results. This contradicts the letter from [REDACTED] that the proffered position requires extensive knowledge and experience in addition to a bachelor's degree.

Overall, the evidence of record is insufficient to establish the substantive nature of the work to be performed by the Beneficiary. This precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

Accordingly, as the Petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position qualifies as a specialty occupation.

#### IV. CONCLUSION AND ORDER

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision.<sup>8</sup> In visa petition proceedings, it is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

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described as follows:

**Level I** (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

<sup>8</sup> Since the identified basis for denial is dispositive of the Petitioner's appeal, we will not address additional grounds of ineligibility we observe in the record of proceeding.

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**ORDER:** The appeal is dismissed.

Cite as *Matter of W-S- LLC*, ID# 14126 (AAO Oct. 16, 2015)